IN THE

Supreme Court of the United States

October Term, 1942.

No. .....

H. F. METCALF, as Trustee in Bankruptcy of the Estate of F. P. NEWPORT CORPORATION, LTD., a corporation, Bankrupt,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Decisions of the Courts Below.

As hereinbefore noted in the Petition, the Referee in Bankruptcy disallowed the claim of the United States of America, and the Referee's findings and order appear in the record. [R. 28-41.] A review was taken by the Government, and the District Court affirmed without opinion the order of the Referee. [R. 188-189.]

The opinion of the Circuit Court of Appeals reversing the District Court appears in the record. [R. 204-210.] (..... Fed. (2d) .....)

II.

Jurisdiction.

The jurisdictional statement appears in the preceding Petition for Writ of Certiorari (*supra*, p. 7).

III.

Statement.

The essential facts are stated in the preceding Petition for Writ of Certiorari (*supra*, pp. 2-6).

IV.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding that the Trustee in Bankruptcy was during the years 1938 and 1939 "operating" the property of the bankrupt corporation within the meaning of Section 52 of the Revenue Act of 1938, Chapter 289.

2. The Circuit Court of Appeals erred in reversing the decision of the District Court.

V.

Summary of Argument.

A. The decision of the Circuit Court of Appeals is in conflict with the decision of the Second Circuit Court of Appeals in *In re Heller, Hirsh & Co., Bankrupt*, 258 Fed. 208.

B. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

VI.
ARGUMENT.

A. The Decision of the Circuit Court of Appeals Is in Conflict With the Decision of the Second Circuit Court of Appeals in In re Heller, Hirsh & Co., 258 Fed. 208.

The decision of the Circuit Court of Appeals in the instant case is contrary to and in conflict with the decision of the Second Circuit Court of Appeals in the above mentioned case.

In the *Heller, Hirsh & Co.* case, the Government sought to obtain payment of an income tax on funds collected by the trustee as a result of a compromise made by him with a foreign corporation of a claim for nonpayment of salary and commissions by that corporation to the bankrupt corporation between the years 1910 and 1914. The Court held that this clearly did not constitute net income earned by a trustee while operating the business of the bankrupt corporation, and refers to the decision of the referee who decided the case initially. The decision of the referee reads in part as follows (page 210-211):

> " 'I find nothing in the act of September 8, 1916, to indicate that Congress intended to impose an income tax upon a trustee in bankruptcy in respect to the assets of a bankrupt corporation which he has taken over to be marshaled and distributed among the creditors of the corporation. To my mind the text of the act of September 8, 1916, does not indicate any such purpose. This view of the act does not deprive the government of its just due. The dividends declared and distributed to the creditors are presumptively income in the hands of the latter subject to an income tax to be assessed against the latter.

" 'Part I of the act of September 8, 1916 (Comp. St. §§ 6336a-6336iii), deals with the income tax on individuals: Section 1 (Comp. St. § 6336a) provides for a tax on "the entire net income" of the individual. Section 5 and section 6 (Comp. St. §§ 6336e, 6336f) provide for certain deductions before the amount of the "net income" is determined. Sections 2(b) and 8(c) (Comp. St. §§ 6336b, 6336h) contemplate cases where the corpus of the individual's property (both after his death or during his lifetime) is in the possession of and the income received by persons acting in a fiduciary capacity.

" 'There is not the slightest suggestion in part I of the statute either that Congress intended to impose an income tax upon an insolvent individual liquidating his own estate or upon the liquidator of an insolvent individual's estate, nor is there any suggestion that it entered into the mind of Congress that such insolvent individual or his liquidator should be regarded as having a "net income."

" 'Such being my conclusion with respect to individuals dealt with in part I of the act, I pass to part II of the act (Comp. St. §§ 6336j-6336n), dealing with the income tax on corporations. I find nothing in part II to indicate that Congress intended to apply a different rule in the case of corporations from that enacted in the case of individuals. Section 10 (Comp. St. § 6336j) imposes an income tax upon the "total net income" received by a corporation. Section 12(a), being section 63361, Comp. St., provides for certain deductions before such "net income" is ascertained.

" 'Great stress is laid by the government on the provisions of section 13(c) of the act of September

8, 1916. The presence of subdivision (c) in the act of September 8, 1916, and its absence from the prior act of October 3, 1913, has to my mind no significance in the present case in view of the peculiar language of subdivision (c).

" 'The language used in subdivision (c) shows that the subdivision was not intended by Congress to apply in the case of receivers or trustees in bankruptcy or assignees who merely marshaled and distributed the assets of an insolvent corporation among its creditors. In terms subdivision (c) applies only in cases where receivers or trustees in bankruptcy or assignees "are operating the property or business of corporations" and thus may be in the receipt of a "net income" as defined in the prior sections of the act. I regard the quoted words as of marked significance.

" 'To my mind the subdivision was inserted in the act to meet the specified case of the profitable operation of the business of a corporation by the officers mentioned; for instance, the operation of the business of a railroad corporation by receivers or the operation of the business of a manufacturing corporation by a trustee in bankruptcy, etc.

" 'In either of such cases it is quite possible that the operation of the business might result in a net income, a result which Congress sought very properly to reach. See Scott v. Western Pacific R. R. Co., 246 Fed. 545, 548, 158 C. C. A. 515 (C. C. A. 9th Circuit, 1917). I repeat my conviction that in enacting subdivision (c) Congress had in mind the definite case so aptly described by the language used, and not the case of the officers mentioned when acting merely as liquidators.

" 'The decisions rendered in this circuit, where receivers were engaged in operating the business of street railroad corporations, give some support to the view I have expressd, although the cases arose under the so-called United States Corporation Tax Law of August 5, 1909, c. 6, 36 Stat. 112, and not under the Income Tax Acts of October 3, 1913, or September 8, 1916.

" 'It has been held that the Corporation Tax Law of 1909 imposed an excise tax upon the business of a corporation in a sum equivalent to 1 per cent. upon the "entire net income" of a corporation above $5,000. It is to be noted that whether the tax imposed be termed an excise tax or a direct income tax, its imposition depended upon the existence of a "net income."

" 'The United States district attorney applied to the Circuit Court to compel the receivers of the Metropolitan Street Railway Company and the receiver of the Third Avenue Railroad Company to file returns for those corporations for the years 1909 and 1910.

" 'The Circuit Judge (Pennsylvania Steel Co. v. New York City Railway Co. (D. C.), 193 Fed. 286) held (bottom of page 287) that the statute was not intended to impose a tax upon the income realized from the assets of a bankrupt corporation whose property had been taken over by a court through its officers to be marshaled and distributed and that the language used did not indicate any such intent.

" 'This ruling, denying the application of the United States district attorney against the receivers, was affirmed by the Circuit Court of Appeals, 198 Fed. 774, 117 C. C. A. 556. The opinion states that

such statutes are to be strictly construed, and that the act of 1909 (198 Fed. 775-777, 117 C. C. A. 557-559) manifested no intent to impose a tax except where a corporation is carrying on business, and not where it is insolvent and in the hands of receivers.

"'The decision of the Circuit Court of Appeals was affirmed by the United States Supreme Court (United States v. Whitridge, 231 U. S. 144, 149, 34 Sup. Ct. 24, 25, 58 L. Ed. 159), the court holding that receivers of insolvent corporations were not within "the spirit" or "the letter" of the act. Attention is also called to the recent decision by Hotchkiss, J., in Lathers v. Hamlin, 102 Misc. Rep. 563, 170 N. Y. Supp. 98.'"

From the foregoing it is observed that prior to 1916 no tax was imposed upon a trustee in bankruptcy regardless of the nature of his transactions. (See also *Reinecke v. Gardner* (1928), 72 L. Ed. 866, at p. 867 [277 U. S. 239].) In 1916 the predecessor of the present Act was passed, its object being to reach "income" of a trustee only in the limited case where he was "operating the property or business of corporations." The Act must be construed most strongly against the Government and in favor of the alleged taxpayer. (See *Gould v. Gould* (1917), 62 L. Ed. 211 [245 U. S. 149].)

The business referred to in Section 52 of the Internal Revenue Act here in question is the business theretofore conducted by the bankrupt corporation. Prior to bankruptcy the business of the bankrupt corporation was that of buying, subdividing, improving and selling real estate, and acting as a broker or selling agent for properties owned by third persons. [R. 31.] This business was not carried on by the Trustee. The transactions of the

Trustee in the instant cause consisted of marshaling, preserving and liquidating the properties of the bankrupt corporation as rapidly as was compatible with the best interests of the parties concerned. The functions so exercised by him, however, were not intended to be nor were they in fact in furtherance of the business theretofore carried on by the bankrupt corporation, but were those normally imposed upon every trustee in bankruptcy by the express provisions of the Bankruptcy Act.

Section 47 of the Bankruptcy Act reads in part as follows:

> "Trustees shall (1) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest."

Congress is presumed to have in mind the provisions of the Bankruptcy Act when it passed Section 52 of the Internal Revenue Law here in question. Had it intended to reach all transactions had by a trustee, it would have provided that the trustee would be liable for the payment of an income tax the same as a corporation in all instances. By limiting the imposition of the tax to those instances where the trustee was operating the business or property of the bankrupt corporation, it intended to confine the impact of the statute to those instances where the trustee was operating the business or property of the bankrupt corporation in the usual significance or application of those terms. It is obvious that the business of the bankrupt corporation was not operated by the Trustee. This leaves for consideration the phrase "operating the property."

To operate the property Congress necessarily refers to its actual use in the business or employment for which it has been contracted or acquired, and with the object or purpose of making a profit. Judge Yankwich of the District Court of the United States, District of Nevada, speaking in the case of *In re Owl Drug Co.* (1937), 21 Fed. Supp. 907, says at pages 909-910:

> "However, section 52 of the Revenue Act of 1934 (26 U. S. C. A. § 52) provided, in part: 'Every corporation subject to taxation under this title (chapter) shall make a return. * * * *In cases where* receivers, *trustees in bankruptcy,* or assignees *are operating the property or business of corporations, such* receivers, *trustees,* or assignees *shall make returns for such corporations in the same manner and form as corporations are required to make returns.* Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.' (Italics added.) Thus, while *every* corporation subject to taxation must make a return, the return is required of receivers, trustees in bankruptcy, and assignees of corporations, *only when they are operating the property or business of the corporation.* The effect of an enactment of this character is stated in Paul & Mertens, op. cit., § 39.29: 'Receivers, trustees in bankruptcy, and assignees *operating the property or business of corporations* are required to file returns in the same manner and form as corporations are required to make returns. *Whether or not there is such operation is determined by the facts in the particular case.* The statute and regulations make a distinction between receivers operating *all* the property or business of an individual or corporation, and

receivers in possession of only part of such property or business. The former type of receiver is required to file a return, the latter is not.' And thus the Board of Tax Appeals: 'The effect of this section is that receivers, trustees in bankruptcy or assignees *who are operating the property or business of corporations* "shall make returns for such corporations."' Trustees of Gonzolus Creek Oil Co. (Dissolved), 12 B. T. A. 310, 322.

"The return is obligatory when the trustee *continues* the bankrupt's business. 'Where receivers or *trustees continue the business* of a bankrupt any income thus earned is taxable under the various federal income tax laws. *But where they merely marshal and distribute the assets of the insolvent, there is no income, and hence no income tax is payable.*' 6 Remington on Bankruptcy (1923), § 2978. (Italics added.) And see Gilbert's Collier on Bankruptcy (4th Ed. (1937) § 1297).

"The trustee must operate all the property of the bankrupt. Burnet v. North American Oil Consol. (C. C. A.), 50 F. (2d) 752; Trojan Oil Co. (1932), 26 B. T. A. 659; Commissioner v. Owens (C. C. A. 10, 1935), 78 F. (2d) 768. When he does, the income is, in truth, that of the corporation. He makes the return 'for the corporation.' However, as under the Bankruptcy Act the property of the bankrupt vests in the trustee, the Supreme Court has held that the income is not the income of the bankrupt corporation, but *'of the trustee, and was subject to income and excess profits tax only if the statutes authorized the assessment of the tax against him.'* Reinecke v. Gardner (1928), 277 U. S. 239, 241, 48 S. Ct. 472, 473, 72 L. Ed. 866. (Italics added.)

"Prior to 1916, no such provision existed in the revenue acts. And courts, on the basis of the principle stated, in Reinecke v. Gardner, *supra*, held uniformly that receivers operating the property of corporations were not subject to this tax. See Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. A. 2, 1912), 198 F. 774; Scott v. Western Pacific Ry. Co. (C. C. A. 9, 1917), 246 F. 545; United States v. Whitridge (1913), 231 U. S. 144, 34 S. Ct. 24, 58 L. Ed. 159.

"Since 1916 (39 Stat. 756) the yearly revenue acts have contained provisions identical with the one under consideration. Their object is to reach a new source of income taxation, not reached before. But income from that source is not available, unless all the conditions imposed by the section coexist. The most fundamental one is that the receiver, trustee in bankruptcy, or assignee must be 'operating the property or business' of a corporation, and all of it.

"To 'operate' means *to put into, or to continue in operation or activity, to manage, to conduct, to carry out or through.* This is both the ordinary and the legal definition of the word. See Webster's New International Dictionary; 6 Words and Phrases, First Series (1904) pp. 4989 *et seq.*; 3 Words and Phrases, Second Series (1914) pp. 743 *et seq.*; 5 Words and Phrases, Third Series (1929) pp. 629 *et seq.*; 2 Words and Phrases, Fourth Series (1933) pp. 864 *et seq.* The new Shorter Oxford English Dictionary defines it as follows: 'To direct the working of, to manage, *conduct, work* (a railway, business, etc.); to carry out, direct to an end (an undertaking, etc.); chiefly U. S. 1880.' Volume II, p. 1374.

"The operation of a business implies its conduct and management not sporadically, but continuously over a definite period of time, with one aim—*profit making*. Repeatedly, when deductions have been claimed by a taxpayer for losses resulting from the claimed 'operation' of a trade or business during the taxable year, under the provisions of the various revenue statutes, allowing such deductions, the courts have held that the requirement of continuity and assiduity had to be satisfied. See Bedell v. Commissioner of Internal Revenue (C. C. A. 2, 1929), 30 F. (2d) 622; Schuette v. Anderson (C. C. A. 2, 1932), 55 F. (2d) 902. And see State of Iowa *ex rel.* Ben J. Gibson, Atty. Gen., Plaintiff, v. American Bonding & Casualty Co., Defendant, United States of America, Claimant (D. C. Iowa, in and for Woodbury County, Sept. 15, 1936, opinion by A. O. Wakefield, Judge, not reported).

"The business of a corporation is 'that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.' Flint v. Stone Tracy Co. (1911), 220 U. S. 107, 171, 31 S. Ct. 342, 357, 55 L. Ed. 389, Ann. Cas. 1912B, 1312."

As pointed out by Judge Yankwich in the foregoing decision, "to 'operate' means to put into, or to continue in operation or activity, to manage, to conduct, to carry out or through." Therefore to operate a property means to conduct or manage that property for the purpose for which it was acquired or contracted, such as the operation of a railroad, the operation of a store or mercantile establishment. In that sense the property or corpus of this bankrupt estate which came into the possession of the Trustee was never operated. It is true that in exer-

cising the functions required of him by the Bankruptcy Act he took possession of the property. He discovered after so acquiring possession that oil was being developed on properties adjacent to a portion of the corpus of this estate. This fact led him to the conclusion that oil underlay this property. *Oil and gas which did underlie the property would be an asset if it could be captured and reduced to possession.* He had no money with which to undertake necessary drilling operations. With the approval, therefore, of the bankruptcy court, he leased the property to the Universal Consolidated Oil Company in order that that company might go upon the property, drill the same and produce such oil and gas and other hydrocarbon substances as might be captured. The operations necessary in drilling the wells and capturing and reducing to possession the oil and gas and other hydrocarbon substances that might underlie the same were performed by the lessee. The lessee paid for the exclusive privilege of going upon the property and drilling for and producing such oil and gas as might be found thereunder, a cash bonus of $25,000 and an additional $25,000 bonus payable out of the proceeds of oil. The lessee was not the agent of the Trustee but an independent contractor, who, for a consideration paid to the Trustee with the approval of the bankruptcy court, acquired the exclusive right to carry on the drilling operations and produce such oil and gas as might as a result thereof be discovered. When produced all but thirty-five per cent thereof was the lessee's property, for which it had paid in cash and services. Thirty-five per cent thereof belonged to the Trustee. This was sold at market and the proceeds paid to the Trustee. Thus an asset was reduced to cash and distributed to a creditor. The result was that the Trustee received dur-

ing the tax years in question, to-wit, 1938 and 1939, a total of $451,851.01 from oil royalties and bonuses. His total receipts for the two years in question amounted to $492,150.33, so that the oil royalties and bonuses accounted for all but $40,299.32 of his total receipts. [R. 37-38.] Under the terms of the lease the Trustee reserved the right to take a portion of the oil in kind. That was a right, however, which was never exercised, and the Trustee has only received payment in cash.

It should be observed that the bankrupt corporation at no time was engaged in the business of acquiring and developing oil wells, or in the business of drilling for or producing oil and gas. It seems clear that the negotiations for and the execution of the lease and the receipt of the cash payments from the lessee did not constitute an operation of the property by the Trustee, but on the contrary was the method adopted for the liquidation and the reduction to cash of an asset which existed only if it could be captured and reduced to possession. That process of capturing and reducing to possession was carried on by an independent contractor and as result thereof the Trustee acquired cash which was distributed pursuant to the orders of the bankruptcy court to a secured creditor to apply on the indebtedness owing it, and to pay taxes assessed against the property.

Sales of real and personal properties during the two years in question accounted for $25,048.53 of the monies received by the Trustee. [R.37-38.] Obviously this was a mere liquidation and the monies were the result of a liquidation, yet the Government attempts to tax the Trustee during 1938 on the amount that the selling price exceeded the original cost to the bankrupt corporation of the property sold. As a result, in every case where a trustee sells

an asset of the bankrupt estate he must pay a tax if he is fortunate enough to sell the same at a price greater than the cost to the bankrupt of the property sold. It seems clear that such a result was never contemplated by Congress, and that the Circuit Court in sanctioning such a tax has given the statute in question a much broader scope and effect than was intended by Congress.

Collections of principal and interest on the bankrupt corporation's accounts receivable amounted to $2,210.80 during the years in question. [R. 37.] Such collections represent the proceeds of a liquidation of receivables which were a part of the assets passing to the Trustee upon his appointment and qualification, and again the receipts resulting therefrom were not acquired as the result of the operation of the business of the bankrupt corporation.

Pending liquidation thereof, the Trustee rented certain of the properties and received as compensation therefor a total of $13,039.99 during the years in question, all of which was absorbed in payment of expenses of administration, including cost of preserving the properties concerned. [R. 37-39.] The rental value of the property so let was an asset which the Trustee was required to preserve for the benefit of the estate until he could sell the property. The collection of such rentals was temporary and only an incident in the process of liquidation.

The above mentioned transactions account for all of the receipts of the Trustee during the two years in question, and at the risk of repetition, we repeat that these transactions by the Trustee were had pursuant to an exercise of his normal duties as Trustee, and did not constitute an operation of the business or property of the corporation within the meaning of Section 52 of the Internal Revenue

law, and the decision of the Circuit Court of Appeals in reversing the District Court and holding that they did amount to an operation of the business or property of the corporation is directly contrary to the case of *In re Heller, Hirsh & Co.*, and particularly the opinion of the referee which was referred to by the Circuit Court in deciding the *Heller, Hirsh & Co.* case.

B. The Circuit Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been but Should Be Settled by This Court.

The decision of the Circuit Court of Appeals is concerned wholly with a construction of Section 52 of the Revenue Act of 1938 and its application to the facts found by the referee in bankruptcy. These facts are without dispute.

A careful and diligent search has been made, but no decision of this Court can be found which involves a construction of this Act as applied to a trustee in bankruptcy. This decision vitally affects the administration of all bankrupt estates and the future administration of the estate here involved. It is particularly important that this Court settle the issue and determine the answer to the following:

(a) Must the trustee pay an income tax on receipts resulting from a liquidation of assets where in the interest of the parties concerned the liquidation process is extended over a period of time?

(b) Where real property of a corporation not theretofore engaged in the oil business passes to a trustee in bankruptcy and he leases the same for the production of such oil and gas as may be found thereunder and receives a bonus for the lease and royalties on oil and gas produced,

is he by virtue of such lease operating the property of the corporation and subject to the payment of an income tax on monies paid to him under such lease?

(c) If one transaction had by the trustee constitutes operating the property of the bankrupt, does this subject him to a tax on all his receipts or only those resulting from the particular transaction?

An answer by this Court to the foregoing queries will be of inestimable value to the administration of all bankrupt estates, for if the liquidation of assets may result in a tax, no distribution can be had in any estate until it is first determined whether or not the transactions had by the trustee in the process of such liquidation subject him to the payment of a tax.

Thus if a bankrupt corporation engaged in the stock and bond business has among its assets at the time of the appointment and qualification of the trustee an orange grove, is the trustee who then acquires title operating the property of the corporation within the meaning of the statute in question, if pending a sale of the grove he causes necessary irrigation to be performed, and harvests and sells the fruit? If that transaction amounts to an operation of the property, is he liable for tax only on receipts from the grove, or must he pay on all receipts, even though the balance of those receipts were the result of sales of securities and collections of the bankrupt's accounts receivable.

It is at once apparent that the problems facing the administration of bankrupt estates are as a result of the decision of the Circuit Court of Appeals multiplied many times, and that a decision by this Court of the issue here

involved will be of inestimable value and aid in the administration of all such estates. The decisions cited by the Circuit Court of Appeals in its decision which involve a construction of the Act, have to do with transactions had by an equity receiver, and do not involve transactions had by a trustee in bankruptcy. The regulations adopted by the Treasury Department clearly recognize the distinction between a trustee in bankruptcy and a receiver. Treasury Regulation 101, promulgated under the Revenue Act of 1938, reads as follows:

> "ART. 52-2. Returns by receivers.—Receivers, trustees in dissolution, trustees in bankruptcy, and assignees, operating the property or business of corporations, must make returns of income for such corporations. If a receiver has full custody of and control over the business or property of a corporation, he shall be deemed to be operating such business or property within the meaning of section 52, whether he is engaged in carrying on the business for which the corporation was organized or only in marshaling, selling, and disposing of its assets for purposes of liquidation. Notwithstanding that the powers and functions of a corporation are suspended and that the property and business are for the time being in the custody of the receiver, trustee, or assignee, subject to the order of the court, such receiver, trustee or assignee stands in the place of the corporate officers and is required to perform all the duties and assume all the liabilites which would devolve upon the officers of the corporation were they in control. (See sections 274 and 298 and articles 274-1 and 274-2.) A receiver in charge

of only part of the property of a corporation, however, as, for example, a receiver in mortgage foreclosure proceedings involving merely a small portion of its property, need not make a return of income."

It will be observed that a receiver in control of all of the business and property of a corporation is deemed by the regulations to be operating the business or property even though he be engaged only in marshaling, selling and disposing of the assets. Apparently the distinction is a result of a recognition of the fact that a receiver has no title; that he operates as an officer of the court in liquidating the property, which nevertheless remains the property of the corporation. The general rule applicable to income tax is that liability therefore attaches to the ownership of the income. (*Blair v. Commissioner of Internal Revenue,* (1937), 81 L. Ed. 465 at 470 [300 U. S. 5].) A receiver is not the owner of the income but merely a custodian. (See *Commissioner of Internal Revenue v. Owens,* 78 Fed. (2d) 768; *North American Oil Consolidated v. Burnet* (1932), 76 L. Ed. 1197 [286 U. S. 417].)

A trustee acquires title and the property is no longer that of the corporation, and necessarily if there is an income as a result of his transactions it is his income and in no sense that of the corporation.

Since the decision of the Circuit Court of Appeals involves a construction of Federal law and the issue is one of national importance, we respectfully urge that it presents a situation wherein this Court should in view of Rule 38, Section 5, Subdivision (b), grant the writ.

Conclusion.

It is respectfully urged that for the reasons hereinbefore stated the Petition should be granted, and a Writ of Certiorari issued to the Circuit Court of Appeals of the Ninth Circuit for the purpose of reviewing the decision in question.

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